With deference, it is prayed that the writ be granted and the judgment reversed and remanded, if indispensable parties be not herein, but if not, then reversed and rendered.

Respectfully submitted,

JUDGE BEN STEVENS,
Hattiesburg, Mississippi.
J. R. BUCHANAN,
L. BARRETT JONES,
Jackson, Mississippi.
WALTER S. WELCH.
GARNER W. GREEN.

WELCH, COOPER & WELCH,
Laurel, Mississippi;
BUCHANAN & MONTGOMERY,
Laurel, Mississippi;
GREEN, GREEN & CHENEY,
801 Standard Life Building,
Jackson, Mississippi,
Of Counsel.

Certificate

I, Garner W. Green, of counsel for petitioners, hereby certify that a true copy hereof has been mailed, postage prepaid, to the Honorable Philip B. Perlman, Solicitor General of the United States, Washington, D. C.

This the 3rd day of August, 1950.

GARNER W. GREEN.

APPENDIX "A"

OPINION OF THE COURT—Filed May 15, 1950

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 12965

KALMIA REALTY & INSURANCE COMPANY, et al., *Appellants,*

versus

UNITED STATES OF AMERICA, *Appellee*

Appeal from the United States District Court of the Southern District of Mississippi

(May 15th, 1950)

Before HUTCHESON, *Chief Judge,* and McCORD and WALLER, *Circuit Judges*

Per CURIAM:

From the standpoint of both reason and result, we think that the decision and judgment of the Court below were correct.

Affirmed.

Conclusions of Law of the District Court, R. 397, as amended, R. 423:

1. One who asserts the invalidity of a document on the ground of fraud has the burden to prove such fraud by clear and convincing evidence, and in this case the Kalmia Realty & Insurance Company has failed to show that the conveyances were made by fraud, or that fraud was practiced upon them. Fraud is never presumed, but must be proven by clear and convincing evidence.

2. The Court concludes as a matter of law that the language contained in the reservation of the oil rights and under the conditions therein provided means that there

must have been oil or minerals mined and produced within five years prior to the termination of the 10-year period or at the time of the termination and that the leasing of lands for exploration by the lessees was not a compliance with the provisions of the deed; and that, construing the deed in its entirety, giving effect to the language used, and in its ordinary and accepted terms, it was the intention of the parties to these documents that there must be a production of oils or minerals, or a well being drilled at the time in order to secure the benefits of the extended provisions.

3. The Court concluded, as a matter of law, that the provisions as follows: "Provided further, that the right or rights to mine and reserve oil and gas and other valuable minerals, when extended, shall be limited to twenty-five acres of land around each well or mine producing and each well or mine being drilled or developed at the time of the first extension, to-wit: December 24, 1943" is void in so undertaking to limit or describe such area of acreage because of the vagueness of the description, but that it cannot be totally disregarded in the construction of the deed in the present controversy. That it has some bearing upon what is meant by the paragraph immediately above it.

4. The Court concludes, further, as a matter of law, that the Government acquired the minerals rights in this property subject to the reservations that were made in the deed hereinbefore referred to, and that under the Acts of Congress, particularly Sections 518 and 519, Title 16, U.S.C.A.— had the right to acquire minerals and, by virtue of the conveyance therein, did acquire the minerals lying under and connected with said lands.

5. The Court concludes as a matter of law that Section 4156 of the Code of Mississippi is constitutional and valid law, and gives valid consent to the Secretary of Agriculture to purchase the lands herein in controversy.

6. The Court concludes as a matter of law that the Mississippi Court's construction of statutes of Mississippi with reference to eminent domain and with reference to purchases by the Highway Department of Mississippi and the Levee

Commission of Mississippi to the effect that such agencies acquired only the easements and do not acquire the mineral rights, while persuasive, yet are not binding on the Government of the United States when its agencies acquire land under the Acts of Congress, but it is the duty of the Court to construe the Acts of Congress and ascertain the purpose and intent of Congress in authorizing the Government to purchase lands, and under the Acts of Congress in the matter here in controversy the Government did acquire the minerals.

7. The Court concludes as a matter of law that the doctrine of merger urged by the defendants is not applicable to the facts of this particular case.

8. The Court concludes as a matter of law that the Government is entitled to a judgment confirming its title as prayed for except that as to the lands embraced in the deed obtained in 1941 the Government's title is subject to the mineral reservation as set forth in said deed.

9. The Court concludes as a matter of law that, even if proved, the misrepresentation which the Government's agent, Mr. Conarro, is charged with making, would not serve as a basis for voiding any part of the deeds to the United States because it dealt with a matter of law with which Kalmia was charged with notice and Mr. Conarro was not authorized to make any representations as to matters of law.

R. 411:

The Court concludes as a matter of law that the Government of the United States owned the minerals under these lands, subject to be defeated by the grantor, Kalmia, only upon a working to advantage of the minerals during the 10-year period prescribed by the deed, and not having done that, the title vested complete in the United States after the expiration of the 10-year period after the execution of the deed.

The date of the deed was December 29, 1933 and by the provisions of the deed Kalmia Realty & Insurance Company reserved the minerals for a period of ten years from December 24, 1933 with the extensions as provided therein and

therefore title vested in the United States on December 24, 1943.

The Court concludes as a matter of law that the United States owned the interest in the minerals subject to be defeated only as provided by the deed and that the minerals were not subject to taxation in so far as the interest of the United States was concerned.

The Court concludes as a matter of law that the only interest that could have been sold for taxes, and as a matter of law all that could have been sold for taxes was the right for a period of ten years in Kalmia to mine for and recover any minerals that were thereunder and thereon, and that ownership by Kalmia was subject to taxation and could have been assessed for taxation, but was subject to the limitation of the deed, and unless the terms of the deed were complied with by a purchaser at such tax sale within a 10-year period prescribed by the deed, no interest in the minerals could be acquired.

The Court concludes as a matter of law that under the law of Mississippi there is or can be a separate ownership between minerals and the surface of the land, and though each is subject to taxation in the hands of private ownership, but not in the hands or ownership of the United States.

APPENDIX "B"

WEEKS ACT, Title 16 U.S.C.A., 36 Stat. 961:

"Sec. 480. Civil and criminal jurisdiction.

"The jurisdiction, both civil and criminal, over persons within national forests shall not be affected or changed by reason of their existence, except so far as the punishment of offenses against the United States therein is concerned; the intent and meaning of this provision being that the State wherein any such national forest is situated shall not, by reason of the establishment thereof, lose its jurisdiction, nor the inhabitants thereof their rights and privileges as citizens, or be absolved from their duties as citizens of the State. June 4, 1897, c. 2, Sec. 1, 30 Stat. 36; March 1, 1911, c. 186, Sec. 12, 36 Stat. 963."

"Sec. 500. Payment and evaluation of receipts to State for schools and roads.

"Twenty-five per centum of all moneys received during any fiscal year from each national forest shall be paid, at the end of such year, by the Secretary of the Treasury to the State in which such national forest is situated, to be expended as the State legislature may prescribe for the benefit of the public schools and public roads of the county or counties in which such national forest is situated: *Provided,* That when any national forest is in more than one State or county the distributive share to each from the proceeds of such forest shall be proportional to its area therein: *Provided further,* That there shall not be paid to any State for any county an amount equal to more than 40 per centum of the total income of such county from all other sources. In sales of logs, ties, poles, posts, cordwood, pulpwood, and other forest products the amounts made available for schools and roads by this section shall be based upon the stumpage value of the timber. As amended Sept. 21, 1944, c. 412, Title II, Sec. 212, 58 Stat. 737."

"Sec. 513. National Forest Reservation Commission; annual report to Congress.

"The National Forest Reservation Commission shall consist of the Secretary of War, the Secretary of the Interior, the Secretary of Agriculture, and two Members of the Senate, to be selected by the President of the Senate and two Members of the House of Representatives, to be selected by the Speaker, and is authorized to consider and pass upon such lands as may be recommended for purchase as provided in section 515 of this title, and to fix the price or prices at which such lands may be purchased, and no purchases shall be made of any lands until such lands have been duly approved for purchase by said commission. The members of the commission shall serve as such only during their incumbency in their respective official positions, and any vacancy on the commission shall be filled in the manner as the original appointment. It shall report annually to Congress through its president, not later than the first Monday in December, its operations

and expenditures in detail, during the preceding fiscal year. March 1, 1911, c. 186, Secs. 4, 5, 36 Stat. 962."

"Sec. 514. Appropriation for expenses of commission; payments

"In lieu of the permanent appropriation, annual appropriations from the general fund of the Treasury of a sum sufficient to pay the necessary expenses of the commission and its members, not to exceed an annual expenditure of $25,000 are authorized. Said appropriations shall be immediately available, and shall be paid out on the audit and order of the president of the said commission, which audit and order shall be conclusive and binding upon all departments as to the correctness of the accounts of said commission. March 1, 1911, c. 186, Sec. 14, 36 Stat. 963; June 26, 1934, c. 756, Sec. 2, 48 Stat. 1225."

"Sec. 515. Examination, location, and recommendation for purchase of forested, cut-over, or denuded lands, and report by Secretary of Agriculture

"The Secretary of Agriculture is authorized and directed to examine, locate, and recommend for purchase such forested, cut-over, or denuded lands within the watersheds of navigable streams as in his judgment may be necessary to the regulation of the flow of navigable streams or for the production of timber and to report to the National Forest Reservation Commission the results of such examination; but before any lands are purchased by the commission said lands shall be examined by the Secretary of Agriculture, in cooperation with the Director of the Geological Survey, and a report made by them to the commission showing that the control of such lands by the Federal Government will promote or protect the navigation of streams or by the Secretary of Agriculture showing that such control will promote the production of timber thereon. March 1, 1911, c. 186, Sec. 6, 36 Stat. 962; June 7, 1924, c. 348, Sec. 6, 43 Stat. 654."

"Sec. 516. Purchase of lands approved by commission; consent of State; exchange of lands; cutting and removing timber

"The Secretary of Agriculture is authorized to purchase, in the name of the United States, such lands as have

been approved for purchase by the National Forest Reservation Commission at the price or prices fixed by said commission. No deed or other instrument of conveyance shall be accepted or approved by the Secretary of Agriculture under this section until the legislature of the State in which the land lies shall have consented to the acquisition of such land by the United States for the purpose of preserving the navigability of navigable streams. With the approval of the National Forest Reservation Commission as provided by this section and section 515 of this title, and when the public interests will be benefited thereby, the Secretary of Agriculture is authorized, in his discretion, to accept on behalf of the United States title to any lands within the exterior boundaries of national forests acquired under said sections which, in his opinion, are chiefly valuable for the purposes as therein stated, and in exchange therefor to convey by deed not to exceed an equal value of such national forest land in the same State, or he may authorize the grantor to cut and remove an equal value of timber within such national forests in the same State, the values in each case to be determined by him. Before any such exchange is effected notice of the contemplated exchange reciting the lands involved shall be published once each week for four successive weeks in some newspaper of general circulation in the county or counties in which may be situated the lands to be accepted, and in some like newspaper published in any county in which may be situated any lands or timber to be given in such exchange. Timber given in such exchanges shall be cut and removed under the laws and regulations relating to such national forests, and under the direction and supervision and in accordance with the requirements of the Secretary of Agriculture. Lands so accepted by the Secretary of Agriculture shall, upon acceptance, become parts of the national forests within whose exterior boundaries they are located, and be subject to all the provisions of sections 480, 500, 513-519 and 521 of this title. March 1, 1911, c. 186, Sec. 7, 36 Stat. 962; March 3, 1925, c. 473, 43 Stat. 1215."

"Sec. 517. Title to lands to be acquired.

"The Secretary of Agriculture may do all things necessary to secure the safe title in the United States to the lands to be acquired under sections 513-519 and 521 of this title, but no payment shall be made for any such lands until the title shall be satisfactory to the Attorney General and shall be vested in the United States. March 1, 1911, c. 186, Sec. 8, 36 Stat. 962."

"Sec. 518. Acquisition of lands not defeated by rights-of-way, easements, and reservations.

"Such acquisition by the United States shall in no case be defeated because of located or defined rights of way, easements, and reservations, which, from their nature will, in the opinion of the National Forest Reservation Commission and the Secretary of Agriculture, in no manner interfere with the use of the lands so encumbered, for the purposes of sections 480, 500, 513-519 and 521 of this title. Such rights of way, easements, and reservations retained by the owner from whom the United States receives title, shall be subject to the rules and regulations prescribed by the Secretary of Agriculture for their occupation, use, operation, protection and administration, and such rules and regulations shall be expressed in and made part of the written instrument conveying title to the lands to the United States; and the use, occupation, and operation of such rights of way, easements, and reservations shall be under, subject to, and in obedience with the rules and regulations so expressed. March 1, 1911, c. 186, Sec. 9, 36 Stat. 962; March 4, 1913, c. 145, 37 Stat. 855."

"Sec. 519. Agricultural lands included in tracts acquired; sale for homesteads.

"In as much as small areas of land chiefly valuable for agriculture may of necessity or by inadvertence be included in tracts acquired under this section and sections 513-518 of this title, the Secretary of Agriculture may, in his discretion, and he is authorized, upon application or otherwise, to examine and ascertain the location and extent of such areas as in his opinion may be occupied for agricultural purposes without injury to the forests or to stream flow and which are not needed for public purposes, and may list and describe the same by metes and bounds, or

otherwise, and offer them for sale as homesteads at their true value, to be fixed by him, to actual settlers, in tracts not exceeding eighty acres, in area, under such joint rules and regulations as the Secretary of Agriculture and the Secretary of the Interior may prescribe; and in case of such sale the jurisdiction over the lands sold shall, ipso facto, revert to the State in which the lands sold lie. And no right, title, interest, or claim in or to any lands acquired under said sections, or the waters thereon, or the products, resources, or use thereof after such lands shall have been so acquired, shall be initiated or perfected, except as in this section provided. March 1, 1911, c. 186, Sec. 10, 36 Stat. 962."

"Sec. 521. Lands acquired to be reserved, held, and administered as national forest lands; designation

"Subject to the provisions of section 519 of this title the lands acquired under Sections 513-519 of this title shall be permanently reserved, held, and administered as national forest lands under the provisions of section 471 of this title and acts supplemental to and amendatory thereof. And the Secretary of Agriculture may from time to time divide the lands acquired under the aforesaid sections into such specific national forests and so designate the same as he may deem best for administrative purposes. March 11, 1911, c. 186, Sec. 11, 36 Stat. 963."

"Sec. 552. Consent to agreement by States for conservation of forests and water supply

"Consent of the Congress of the United States is given to each of the several States of the Union to enter into any agreement or compact, not in conflict with any law of the United States, with any other State or States for the purpose of conserving the forests and the water supply of the States entering into such agreement or compact. March 1, 1911, c. 186, Sec. 1, 36 Stat. 961."

"Sec. 563. Cooperation with States for fire protection on private or State forest lands upon the watersheds of navigable rivers

"The Secretary of Agriculture is authorized, and on such conditions as he deems wise, to stipulate and agree with any State or group of States to cooperate in the organization and maintenance of a system of fire protection on any pri-

vate or State forest lands within such State or States and situated upon the watershed of a navigable river. No such stipulation or agreement shall be made with any State which has not provided by law for a system of forest-fire protection. In no case shall the amount expended in any State exceed in any fiscal year the amount appropriated by that State for the same purpose during the same fiscal year. March 1, 1911, c. 186, Sec. 2, 36 Stat. 961."

APPENDIX "C"

The Mississippi consent statute, Section 4156 of the *Mississippi Code of 1942,* reads as follows:

> "National forestry lands.—The consent of the state of Mississippi is hereby given to the acquisition by the United States by purchase or gift of such land in Mississippi, *as in the opinion of the federal government and the state of forestry commission may be needed for the establishment of a national forest or forests* 'or reclamation or colonization projects' in this region; *provided that the state shall retain a concurrent jurisdiction with the United States in and over such lands, reserving to the state in a ceded territory full civil and criminal jurisdiction concurrently with the federal government in all violations of the state and federal laws,* so that civil process in all cases and such criminal process as may issue under the authority of the state against the person charged with a commission of any crime without or within the said jurisdiction may be executed thereon in like manner as before the adoption of this land. Power is hereby conferred on congress to pass such laws as it may *deem necessary to the acquisition as herein provided for incorporation in said national forest of such forest covered or cut over lands lying in Mississippi as in the opinion of the federal government may be needed.* The power is hereby conferred upon congress to pass such laws and to make or provide for the making of such rules of both civil and

criminal nature and provide punishment for violation thereof, as in its judgment may be necessary for the management, control and protection of such lands as may from time to time be acquired by the United States under the provisions of this section." (Italics ours.)

APPENDIX "D"

Hendrix v. *Foote,* 205 Miss. 1, 38 So. 2d 111, 114:

* * * * * * *

Let us now consider the second question: Does Section 9770, Code of 1942, authorize the separate assessment, and, if the taxes are not paid, the subsequent sale for delinquent taxes of a fractional interest in the oil, gas, and other minerals? The former opinion held that it does not. We have carefully reconsidered this whole matter, and a majority of the Judges agree that the Suggestion of Error should be sustained and the former opinion withdrawn.

One hundred years ago, in 1848, the Legislature enacted what now appears as Section 9772 of the 1942 Code, which read as follows:

"In making this land roll the assessor shall commence the assessment with the lowest number of range and township in his county, and with the northeast corner of each township, and shall proceed numerically, with all the sections, townships, and ranges in his county, first setting down all the subdivisions of each section, if they belong to different individuals, or the whole section together if owned by one person, and not divided on account of parcels being of different values; and if more than one person shall claim to be the owner of the same tract or parcel of land the assessor shall so state in his assessment roll, and the tax collector shall only collect the taxes on one assessment. * * *"

In Stevenson v. Reed, 90 Miss. 341, 43 So. 433, decided in 1907, it was said that under this statute a sale for delinquent taxes of an undivided one-half interest in an eighty acre tract was illegal. In Fountain v. Joullian, 110

Miss. 812, 71 So. 2, decided in 1916, it was held that the statute does not authorize a tax collector to apportion the different undivided interests to any number of parties who may claim such interests therein and sell such undivided interests for the delinquent taxes due thereon. The statute itself provides that: "* * * If more than one person shall claim to be the owner of the same tract or parcel of land the assessor shall so state in his assessment roll, and the tax collector shall only collect the taxes on one assessment."

It is beyond dispute that in 1930, when the Legislature enacted Chapter 171 of the Laws of 1930, which now appears as Section 9770 of the Code of 1942, fractional undivided interests in land could not be separately assessed to the respective fractional owners, so that each such fractional owner could have his undivided fractional interest separately assessed to him. Neither could he pay the taxes due only on his fractional interest and in default thereof have the tax collector sell only such fractional undivided interest. It was required by the statute that all of said fractional interests be assessed as a whole, and that the assessor state on the assessment roll that the tract was claimed by more than one person as owner, and the tax collector was required to collect the whole taxes on all the fractional interests under the one assessment. But, in Davidson v. Wallace (1876), 53 Miss. 475, it was held that where one tenant in common paid the whole taxes on the land to prevent a sale of it, he, or his assigns, were entitled to and might enforce a lien on the interests of his co-tenants for the amount each co-tenant should have paid.

The Legislature knew this status of the law on the assessment of undivided fractional interests in land, at the time it enacted Chapter 171 of the Laws of 1930. They knew that fractional interests in land could not be separately assessed.

The Legislature in 1930 also knew that in Stokely v. State, et al., 149 Miss. 435, 115 So. 563, decided in 1927, this Court had held that an oil and gas lease is a conveyance of an interest in land, and that in Moss v. Jourdan, 129 Miss. 598, 92 So. 689, (decided in 1922) it had been held that

minerals in place were capable of separate ownership from the surface of the land and that the owner of such minerals had the right to remove same from the land, subject to claim for such damage as might be thereby occasioned to the owner of the surface.

The Legislature, at that time, also knew that the Amory and Jackson fields had been discovered and that large scale buying and selling of mineral interest in lands in said fields was a matter of common daily occurrence. They knew, too, that customarily the owner of the fee would execute a lease to a producing company, conveying an undivided seven-eighths interest in the oil and gas; that the fee owner would reserve an undivided one-eighth interest therein; that frequently the holder of the lease would convey an overriding royalty; that the owner of the fee would convey to purchasers a part of his royalty and these purchasers would split up their purchases in sales to many others, resulting quickly and shortly in large numbers of owners, owning small undivided fractional interests in the minerals.

The Legislature also knew that under the law, as it then stood, no individual owner could have his small undivided fractional interest separately assessed to him. They knew that if landowner A had given a seven-eighths oil and gas lease on his lands, to B, retaining a one-eighth royalty and had then sold one-half of his royalty to C, that there would have occurred a severance of the seven-eighth leasehold interest belonging to B and the one-sixteenth royalty interest owned by C, but neither B nor C could have their fractional undivided interest separately assessed to them, but that the whole mineral interest was required by the statute to be assessed as a unit belonging to more than one person and the tax collector was required to make one sale of the whole unit on the one assessment. If John Doe should be the owner of an undivided .0002 interest in the unit, the value of which unit was six hundred thousand dollars, and the taxes due on the whole unit amounted to $18,000.00, then John Doe would find it impossible to have his .0002 interest separately assessed to him at its proportionate value of $120.00, but the whole

mineral unit was required by law to be assessed as a unit, and if the taxes were unpaid, the law placed on John Doe the duty of paying the entire tax bill of $18,000.00 on the entire unit in order to avoid the sale of his interest, though on it there was due for taxes only the proportionate sum of $3.60, and then sue his numerous and sundry co-tenants for a contribution of the respective amount due proportionately by each of them. He would find it impossible to raise so large a sum and accordingly his interest would be confiscated for taxes.

So, in 1930, the Legislature, realizing the necessity for relief, enacted Chapter 171 of the Laws of 1930, now appearing as Section 9770, Code of 1942, which reads as follows:

"Whenever any buildings, improvements, or structures, mineral, gas, oil, timber or similar interests in real estate, including building permits or reservations, are owned separately and apart from and independently of the rights and interests owned in the surface of such real estate, or when any person reserves any right or interest, or has any leasehold in the elements above enumerated, all of such interests shall be assessed and taxed separately from such surface rights and interests in said real estate, and shall be sold for taxes in the same manner and with the same effect as other interests in real estate are sold for taxes. All interests in real estate herein enumerated shall be returned to the tax assessor within the same time and in the same manner as the owners of land are now required by law to list lands for assessment and taxation and under like penalties. The tax assessor shall enter the assessment of the interests herein enumerated upon the assessment roll by entering the same upon the next succeeding line or lines of the roll following the assessment of the surface owner, the name of the owner and the name of the interest, and by placing the value in the appropriate column or columns on the roll; or the assessor may enter the assessment of any or all of such interests upon a page or pages in the land roll following the assessment of the lands of the county, and the value of all such interests shall be included in the recapitulation of the roll. And the value

of said interest or interests shall be determined and fixed in the same manner and by the same officials now required by law to value and assess property for taxation."

It is known to everyone that many large producing oil companies own fractional leasehold interests in this State which have been assessed to them and upon which they have paid the taxes. In many instances, the taxes due upon the assessment against the surface of the lands have contained no exception of the minerals, so separately assessed to such companies, and said taxes have not been paid, and said lands have been sold for the payment of such taxes. If such fractional leasehold interests are not separately assessable for taxes and said attempted assessments thereon are void, then many fractional leasehold interests, some producing oil, would be lost to their owners and title thereto passed to such purchasers at such tax sales. Stern v. Parker, 200 Miss. 27, 25 So. (2d) 787.

It is also well known that for twenty years owners of separately owned minerals, royalties and leaseholds have been separately assessed with and have paid taxes on such separately owned interests. These oil and gas interests were fractional undivided interests and often of trivial value. The legislature recognized the nuisance connected with the assessment and taxation of separate minerals, royalty and leasehold ownerships, and passes the Documentary Stamp Act of 1946, being Chapter 409, Laws of 1946, Section 2 of which reads as follows:

"To encourage the purchase of leases upon and interests in oil, gas and other minerals in the State of Mississippi, to encourage drilling for and production of such minerals, and to relieve the taxing officials of the counties of the state of the onerous duties of assessment for, collection of and sale for ad valorem taxes for such interests (which the Legislature finds are generally assessed at nominal values resulting in taxes not commensutate with the services requires of such officers), all non-producing leasehold interests upon all oil, gas and other minerals in, on or under lands lying within the State of Mississippi, created or assigned after the effective date of this act, and also all non-producing interests in such oil, gas and other minerals (including

royalty interests therein) hereafter conveyed to a grantee or purchaser or excepted or reserved to a grantor separately and apart from the surface, shall be exempt from all ad valorem taxes levied on or after January 1, 1947, by the State of Mississippi, or any county, municipality, levee district, road district, school district, dra-nage district or other taxing district within the State of — becoming a lien on or after said date. Any sale for taxes of the surface or of the remainder of the fee shall not in any manner whatsoever affect the interest or interests hereby exempted.

"For the same purpose and with like effect there is hereby likewise exempted from such ad valorem taxation all such interests created prior to the passage of this act which are owned separately and apart from the surface, provided that as a condition precedent to obtaining such exemption upon existing interests the then owner thereof shall make application for exemption of the interest then owned by him as hereinafter provided and pay, by the purchase of documentary tax stamps, a sum equivalent to the tax herein levied by Section 4, et seq., on instruments hereafter executed creating, transferring or reserving corresponding or similar interests. If any such sum is paid after January 1, 1947, then such exemption shall apply only to taxes becoming a lien after such sum is thus paid."

Stern v. Parker, supra, holds that *the fractional mineral interest must be separately assessed* or it will pass under a tax sale of the fee in the land. Section 9770 permits assessments where "owned separately and apart from and independently of the rights and interests in the surface of such real estate." Suppose A owns a tract of land and executed to B an oil and gas lease upon the same, conveying to B a determinable fee in an undivided seven-eights of the oil and gas in place and reserving to A an undivided one-eighth royalty interest therein; then A sells to C one-half of his royalty or an undivided one-sixteenth interest. Now the one-sixteenth royalty retained by A is not "owned separately and apart from and independent of the rights and interests in the surface of such real estate" and is not subject to assessment under Section 9770, so unless Section

9770 permits a separate assessment to B of his leasehold interest and separate assessment to C of his royalty interest, then there could be no assessment as it would be impossible to include all of the separately owned interests, including A's retained royalty, under one unit assessment of the whole.

The Amory and Jackson gas fields had been discovered when the Legislature enacted Section 9770, and the Legislature was dealing with an entirely new and independent subject matter that had arisen with reference thereto. The assessment of interests in oil and gas could not be handled adequately, justly and conveniently under the then existing law. They established and had the right to establish a different method of assessment, just as had been done in the case of banks, corporations, and joint stock companies, so long as the law applied equally on all within the class and was not discriminatory against others occupying a like position. Section 9770 does not deal with the same subject matter as Section 9772 and is not in pari materia with it. The language contained in Section 9772: "and if more than one person shall claim to be the owner of the same tract or parcel of land the assessor shall so state in his assessment roll * * *" cannot control Section 9770 which is a later enactment and is not in pari materia with it.

If it be said that Section 9770 is dependent upon Section 9772 for a part of the plan of assessment or collection, this does not make Section 9770 in pari materia with Section 9772. The Legislature, in enacting Section 9770, was dealing with an entirely new subject matter, not known of at the time of the enactment of Section 9772, nearly one hundred years previous. The most that can be made of such an argument is that it pretends to make Section 9770 ambiguous and uncertain as to whether the language in Section 9772 "and the tax collector shall only collect the taxes on one assessment" shall apply to sales under Section 9770. We think it does for there is no ambiguity. When the undivided fractional interest is separately assessed to the owner it would still follow that the "tax collector shall only collect the taxes on one assessment." Such is the clear legislative intent. There is no ambiguity here. But, if

there were an ambiguity, this Court has repeatedly held that where the meaning of a statute is not clear, resort is had to the real purpose and intention of the Legislature in adopting the statute, which, when ascertained, the Court will give effect thereto, even though the letter of the statute be violated. What is within the intention is within the meaning of the statute, although not within the letter. Gunter v. City of Jackson, 130 Miss. 637, 94 So. 844; Kennington v. Heningway, 101 Miss. 259, 57 So. 809, 39 L. R. A. (N. S.) 541, Ann. Cas. 1914B 392; Learned v. Corley, 43 Miss. 687; Bonds v. Greer, 56 Miss. 710; Adams v. Y & M V R R Company, 75 Miss. 275, 22 So. 824. And, furthermore, the Court, in construing a statute, will not impute an unjust and unwise purpose to the Legislature when any other reasonable construction can save it from such imputation. Dunn v. Clinghan, 93 Miss. 310, 47 So. 503; Gunter v. City of Jackson, supra.

It is evident that this Court, speaking through Judge Griffith, in ruling on the Suggestion of Error in Stern v. Parker, 200 Miss. 41, 27 So. (2d) 402, expressed only the obvious, when it said: "Undoubtedly it was a purpose of Section 9770, Code of 1942, to allow the assessments of the separate interests therein mentioned to be so made as to relieve the owners of such interest of any concern or responsibility as to any other interests in the described parcel of land * * *."

We have reached the conclusion that Section 9770 permits and requires the separate assessment of undivided fractional interests in oil and gas, in place, to each separate owner of such a fractional undivided interest, insofar as not exempted by Chapter 134, Laws of 1944, and that the assessments of the undivided interests in the case at bar to Alfred Foote were valid assessments and the sale thereof passed title to Tom Hendrix, the purchaser.

If there be any conflict between this opinion, based as it is on the facts of this case, and the holdings in Gulf Refining Company v. Stone, 197 Miss. 713, 21 So. (2d) 19, and Smith County Oil Company v. Board of Supervisors of Simpson County, 200 Miss. 18, 25 So. (2d) 457, based as they are on

the facts in those cases, then the opinion herein shall control."

Approved in *Beard* v. *Stanley,* 205 Miss. 723, 39 So. 2d 317, 320; *Bailey* v. *Federal Land Bank,* 206 Miss. 354, 40 So. 2d 173, 175, 176; and *State* v. *Cummings,* 206 Miss. 630, 40 So. 2d 587, 589.

APPENDIX "E"

Mississippi Blue Book, issued by Heber Ladner, Secretary of State, 1945 to 1949, page 135, et seq.:

Oil and Gas Development in Mississippi
As of June 1, 1948

By H. M. Morse, Secretary, State Oil and Gas Board

The search for oil and gas in Mississippi began in the year 1903, with the drilling of a well near Enterprise, Clarke County, Mississippi. The well was abandoned as dry at a total depth of 1,842 feet. However, it was not until 1926, that production was obtained with the discovery of the Amory Gas Field, near Amory in Monroe County. Gas from this field supplied the towns of Amory, Tupelo, and Aberdeen, but by 1937 the field was abandoned, after having produced 1,717,109,000 cubic feet of gas. Since that time gas and oil production has been obtained in eighteen other counties in the State. Mississippi has produced a total of 180,487,832 barrels of oil and now ranks ninth among all the oil producing states in the nation.

* * * * * * *

The following is an alphabetical list of the active oil and gas fields in the state with a few comments on each:

Baxterville Oil Field

The Baxterville Oil Field, located about fourteen miles southwest of Purvis in Lamar County, was discovered by

the Gulf Refining Company in 1944. At the present time there are 101 wells which have produced a total of 9,310,231 barrels of both oil and condensate. The field also extends into Marion County.

Brookhaven Oil Field

The California Company discovered the Brookhaven Field, located approximately five miles northwest of Brookhaven, Lincoln County, in 1943. This was the first well to be completed in the Lower Tuscaloosa formation in Mississippi. On June 1 there were a total of 140 wells which had produced from the beginning 7,627,653 barrels of oil. This field is now in the process of being unitized.

Carthage Point Field

Originally known as the Natchez Field, the Carthage Point Field is located about five miles southwest of Natchez in Adams County. Pure Oil Company first discovered this field in 1943 but later abandoned their McDowell No. 1 which had produced 650 barrels of oil. However, they completed their McDowell No. 2 in 1945 which is recognized as the discovery well of the field. On June 1 there were six wells producing. The cumulated production for this field is 813,287 barrels of oil. The gas is sold to Interstate Natural Gas Company line which is located very near the field.

Cranfield Field

Located approximately twelve miles east of Natchez in Adams and Franklin Counties, the Cranfield Field is one of the largest producers in the state with ninety-three wells at the present time which have produced a total of 15,196,530 barrels of oil and condensate. Production is from both the Wilcox and the Lower Tuscaloosa formations. In 1947 a unitization project was completed whereby production from the Lower Tuscaloosa was used to recycle gas into the formation in order to maintain pressure and to utilize all hydrocarbons, both liquid and gas. The plant is operated by the California Company.

Eucutta Oil Field

This field is located about fourteen miles northwest of Waynesboro, and it was discovered by the Gulf Refining Company in 1943. Since that time the field has produced a total of 8,544,568 barrels of oil and has 121 wells producing.

Fayette Field

In 1945 the Humble Oil and Refining Company discovered the Fayette Field about six miles northwest of the town of Fayette, Jefferson County. Humble is still the only operator in the field. They have a total of 8 wells, and to date these wells have produced 418,357 barrels of oil.

Flora Field

The Flora Field is near Flora in Madison County, and it was discovered by the Love Petroleum Company in the fall of 1943. There are four wells in the field, and the total production to date is 65,488 barrels of oil.

Gwinville Field

S. W. Richardson, with his completion of the C. E. Berry No. 1, discovered in 1944 the Gwinville Gas Field, which is located approximately seven miles northwest of Prentiss in Jefferson Davis County. All wells in the field, with the exception of three oil wells, are productive of gas and condensate from two reservoirs. At the present time there are 61 wells in the field. A total of 715,934 barrels of oil and condensate have been produced. The two pipe lines in the field run approximately 5,000,000,000 cubic feet of gas a month. This field is quite important from a gas production standpoint.

Heidelberg Oil Field

The town of Heidelberg in Jasper County is the location of the Heidelberg Field, which has a total cumulated production of 15,593,201 barrels of oil, with a total of 142 wells producing. This field was discovered by the Gulf Refining Company in 1944.

Hub Field

Humble Oil and Refining Company discovered the Hub Field in 1945. This field is located about ten miles southeast of Columbia in Marion County. At the present time there are 14 wells, and the total production for the field is 341,524 barrels of oil.

Jackson Gas Field

The Jackson Gas Field is made up of 7500 acres in and around Jackson in Hinds and Rankin Counties. To date this field has produced around 116 billion cubic feet of gas. At the present time there are only sixteen wells producing. The field was discovered in 1930.

LaGrange Oil Field

The LaGrange Field is located approximately five miles southeast of Natchez in Adams County. It was discovered by the Sohio Petroleum Company in 1946, and since its discovery 1,864,839 barrels of oil have been produced. About 65 wells were producing on June 1, 1947.

Langsdale Oil Field

Sixteen miles southeast of Quitman in Clarke County the Kirby Petroleum Company discovered the Langsdale Field in 1944. Since its discovery three operators have produced 969,766 barrels of oil from 27 wells. The oil is of low gravity.

Mallalieu Oil Field

Another discovery of the California Company in Lincoln County is the Mallalieu Field which is located about six miles south of Brookhaven. This field was brought in during 1944 and has produced a total of 4,696,429 barrels of oil. On June 1 there were 69 producing wells.

Oldenburg Field

J. C. Hawkins discovered the Oldenburg Field in Franklin County in October of 1947. Because of its recent dis-

covery the field has only two producers which have produced a total of 12,137 barrels of oil.

Ovett Field

One of the newer producing areas is the Ovett Field located in Jones County near the town of Ovett. Gulf Refining Company discovered this field in 1947, and to date there is only one well.

Pine Ridge Field

The Pine Ridge Field in Adams County was discovered in 1946 by the Phillips Petroleum Company. This is another small field, with only two wells, but to date it has produced 74,620 barrels of oil.

SoSo Field

The SoSo Field, located approximately fourteen miles northwest of Laurel in Jasper and Jones Counties, was discovered by the Gulf Refining Company in 1945. At the present time there are 7 wells producing gas and condensate. United Gas Pipe Line Company moves the gas from this field. To date the wells have produced a total of 15,964 barrels of condensate.

Tinsley Oil Field

The Tinsley Field, the first oil field in the state, was discovered during the latter part of 1939 by the Union Producing Company. It is situated about nine miles southwest of Yazoo City. From this field most of the oil in the state has come, for up to June 1, 1948, it has produced a total of 103,564,261 barrels of oil. At this time there are 285 wells.

Vaughn-Pickens Oil Field

Situated in Madison and Yazoo Counties, the Vaughn-Pickens Oil Field was discovered by Kingwood Oil Company in 1940. This field produces about 118,000 barrels a month from 46 wells. The total cumulation of production is 10,497,911 barrels of oil.

Yellow Creek Oil Field

During 1948 the Yellow Creek Field, discovered in December, 1947 by Hughes and Sistrunk and located southeast of the Eucutta Field in Wayne County, has seen a big development. Already it has produced 79,220 barrels of oil from ten wells. Drilling is going along at a rapid pace at this time.

Discoveries of New Fields

Since June 1, 1948, through February 1, 1949

• • • • • • •

East Yellow Creek—Cashion, Sistrunk & Cameron discovered this field with their Stanley No. 1 in Section 8, Township 9 North, Range 7 West, *Wayne County,* on August 15, 1948.

• • • • • • •

August 3, 1950.

Mr. G. W. Green,
Standard Life Building,
Jackson, Mississippi.

Dear Sir:

The amount of severance tax collected by the State of Mississippi on crude petroleum oils from March 1, 1944, the date the oil severance tax became effective, through June 30, 1950, was $22,386,632.93; and the amount of severance tax collected by the State of Mississippi on natural gas from July 1, 1948, the date the gas severance tax became effective, through June 30, 1950, was $604,513.93. The total of the two collections is $22,991,146.86.

Set out on the following and attached sheet are summaries of our records on oil and gas for each year since the severance taxes became effective, showing quantities of production and sales, values of production, and amounts of tax collected. For June, 1950, only the quantities sold and amounts

of tax collections are shown because the other figures have not yet been entered on our books.

Yours very truly,

W. H. WALLACE,

Chief, Oil and Gas Severance Tax Division.

STATE OF MISSISSIPPI,
County of Hinds.

I, A. S. Coody, Secretary of the State Tax Commission of the State of Mississippi, do hereby certify that W. H. Wallace, whose signature appears above, is the Chief of the Oil and Gas Severance Tax Division of said Commission and that the figures stated on the following and attached sheet are in accord with the records of the said Commission.

Witness my signature this the 3rd day of August, 1950.

[SEAL.] A. S. COODY,

Secretary, Mississippi State Tax Commission.

State Tax Commission
Jackson, Mississippi

Oil Severance Tax Data

Year	Barrels Of Oil Produced	Value Of Oil Produced	Barrels Of Oil Sold	Tax Collected
1944 (10 months)	13,768,665	$ 14,122,840	13,583,637	$ 859,388.88
1945	19,000,067	19,290,062	18,875,780	1,202,602.77
1946	24,300,911	30,323,206	24,245,130	1,832,052.10
1947	35,182,849	61,973,190	35,089,706	3,689,431.26
1948	45,621,312	110,284,337	45,585,366	6,612,041.14
1949	37,837,582	93,128,421	37,824,008	5,590,142.05
Totals	175,711,386	$329,122,056	175,203,627	$19,785,658.20
1950 (Jan.-May, 5 months)	15,024,771	35,949,427	15,027,702	2,158,479.24
Totals	190,736,157	$365,071,483	190,231,329	$21,944,137.44
1950 (June)			3,308,731	442,495.48
Totals, Mar. 1, 1944 to June 30, 1950			193,540,060	$22,386,632 92

Natural Gas Severance Tax Data

Year	MCF Gas Produced (Including Recycled And Exempt)	MCF Gas Sold And Used (Taxable)	Value Of Gas Sold And Used	Tax Collected
1948 (6 months).....	46,366,969	28,746,813	$1,656,185	$103,323.42
1949.....	107,908,539	70,207,756	4,543,197	274,951.08
Totals.....	154,275,508	98,954,569	$6,199,382	$378,274.50
1950 (Jan.-May, 5 months).	62,757,747	45,802,681	3,135,248	189,245.01
Totals.....	217,033,255	144,757,250	$9,334,630	$567,519.51
1950 (June).....		8,892,748		36,994.42
Totals, July 1, 1948 to June 30, 1950....		153,649,998		$604,513.93

" 'The legislature shall have the power to consent to the acquisition of additional territory by the state, and to make the same a part thereof; and the legislature may settle disputed boundaries between this state and its coterminus states wherever such disputes arise.'

"It is to be noted that the legislature is authorized to consent to acquisitions, not to cessions, to accept, not to grant. * * *"

"If the legislature has the power to authorize directly or through a state agency the transfer of the lands in the state to another sovereign, *such authority must be found outside of the constitution.*

"* * *

"The preservation of the integrity of the states is necessary to the preservation of the Union. *Both are intended to be indestructible.* Even encroachments in the way of regulation have to be prevented. In the Evans case, supra, (18 So. 2d 301) the encroachment identified and condemned was only with respect to the adjustment of drainage district securities in relation to land values; and while the bankruptcy statute involved was amended in 1937, and the Supreme Court (United States v. Bekins, 304 U. S. L. Ed. 1137) upheld it as amended, the court was precise in its finding that the amendment left the bankruptcy court without any authority to deal with the land, confining the operation of the amendment to the function of aiding the state in doing something that the state could not do alone, that is, to compel creditors to accept a reduction of their claims.

The state could not do this because of the constitutional inhibition against impairment of the obligation of contracts; and it was found that the State of California had consented to the application of the federal statute to its affairs.

"The arresting features of the activities of the federal government in acquiring our timber lands is that the changes that are thus brought about are permanent in character; involved a reduction of the state's natural wealth; effect a 'defalcation' (Mr. Madison's term) from the State's power and sovereignty. In general it is the difference between mere regulation and outright ownership. If it can be continued, then we have a 'destructable' state.

In the Ashton case, supra (at p. 1314 of 80 L. Ed.) the court said:

> " 'Neither consent nor submission by the states can enlarge the powers of Congress; none can exist except those which are granted. United States v. Butler, decided January 6, 1936, 297 U. S. 1, ante, 477, 56 S. Ct. 312, 102 A. L. R. 914. The sovereignty of the state essential to its proper functioning under the Federal Constitution cannot be surrendered; it cannot be taken away by any form of legislation. See United States v. Constantine, 296 U. S. 287, ante, 233, 56 S. Ct. 223.'

"It is significant, as an indication that the attention of the public and of the legislature has not been focused upon the government's program of taking over our land, that the statute purporting to give authority to the State Forestry Commission to co-operate with the government representatives *gives no regard to the disturbance of taxing district financial affairs. The government takes over the land without making any provisions for tax burdens already put upon the land in a legal way.* This disturbance of local financial affairs is of as much concern to the property owners and the districts involved as it is in instances of the kind dealt with in Evans v. Bankston, supra. Not only does the government thus interfere with local financial affairs in a manner more disturbing than that condemned in Evans v. Bankston but it goes further still,—it nullifies the lien on the faith of which securities were sold and in addition takes over the

land itself and removes it beyond the reach of state taxation. How important this appears to be when attention is called to it is indicated by Chapter 53 of the Laws of 1935, now appearing as Sections 4753 to 4755, inclusive, Code of 1942. These sections undertake to authorize the owners of lands in drainage districts organized under Chapter 195 of the Laws of 1912 and its amendments to convey lands to the government for forestry purposes upon condition that there be deposited with the depository of the district a sum equal to the total assessed benefits remaining unpaid. This calls for a court proceeding. The chancery court may cancel the lien upon the payment of the amount of the assessed benefits. And see chapter 293, Laws of 1940, Sections 9854-9869, of the 1942 Code, dealing with reclamation or resettlement 'Projects'. In that statute provision is made for the payment of sums by the United States in lieu of taxes. The tax burden carried by the lands when acquired by the United States is not transferred to other lands in the taxing district.

"Section 84 of our constitution commands the legislature to limit, restrict or prevent the acquiring and holding of land in this state by non-resident aliens and authorizes it to limit or restrict the acquisition or holding of lands by corporations. Our legislature has undertaken to execute the mandates of the said Section 84.

"* * *

"Chapter 54 of the Laws of Mississippi of 1928, Code Section 4156, purports to give the consent of the State to the acquisition by the United States of lands its representatives may desire to take over where the State Forestry Commission concurs with the National Forest Reservation Commission in the opinion that the land in question is needed for national forest purposes. *The statute is one of doubtful validity even though it should be assumed that the legislature of the State of Mississippi has authority to bind the state to the transfer by state officers or by private owners of a part of its domain to the United States for forestry purposes.*

"*I do not deem it necessary to enter here upon an elaboration of the reasons supporting my opinion that the said Act*

of 1928 is void. It is enough to say that the legislature undertook to vest in the State Forestry Commission far-extending authority of a kind which the constitution has not expressly or by implication reposed in the legislature itself. The statute is to be tested, not by what has up to date been done by virtue of its provisions, but by what it grants authority to do (Ashton v. Cameron County Water Improvement District, at p. 1314 of 80 L. ed.). If the legislature is given no authority to cede Perry County to the United States it cannot authorize the transfer of the timber lands therein to the United States for timber-growing purposes; and if this cannot be done by a special act of the legislature it cannot be done by a general act to be applied to special instances by the State Forestry Commission as it sees fit.

"This is not a matter for the individual citizen to decide. He holds his title subject to the state's proprietary interest. *He cannot give, devise or sell his land to another sovereign. Power in the citizen to do that could not be harmonized with the power of the State to preserve itself.* The rule is universal that the state laws govern all questions of title to lands within its borders. This is a law of self-preservation.

"It is my purpose to question the validity of the transfers that the Secretary of Agriculture has taken to lands in the state for the purpose of growing timber, that is, for inclusion in national forests. Whether the challenge will be made through court proceedings or the matter will be pursued through negotiation and appeals to the legislature and the congress I have not determined. But the said instruments of conveyance are of doubted validity and I consider it to be my official duty to bring the issue to a test in the name of the State of Mississippi. Nicholson v. Myres, 154 So. 282, and cases cited at page 283.

"*The instruments of conveyance invite attack not only because of the absence of any binding commitment by the state but also on the grounds that the Secretary of Agriculture in accepting them did not observe the conditions the congress imposed in granting the authority under which the Secretary claimed to be acting.*

"The setting aside of these instruments of conveyance at the instance of the state would create some confusion.

The federal government as a matter of equity would be entitled to a return of the amount invested in the lands. The original grantors might not be able and willing to make the refund. The state itself, to preserve the integrity of its domain and at the same time to see that equity is done, might through its legislature provide a remedy or an adjustment that would be satisfactory to all concerned.

"In view of the above considerations, I respectfully suggest the advisability of the State Forestry Commission refraining from approving in any form any further acquisitions by the Secretary of Agriculture of lands for timber growing purposes and from further co-operation with the representatives of the Secretary of Agriculture looking to such acquisitions; and that the Commission withdraw any approvals heretofore given or attempted to be given, in whatever form, with respect to transactions that have been consummated or have not reached the stage of agreement to consummate. I suggest and advise that the Commission take this course pending the ultimate settlement of the issue as to the validity of transfers that have already been taken. *The making of other such transfers would add to the confusion, in the event it should be finally decided by the proper authority, judicial or otherwise, that the said transfers are invalid.*"

APPENDIX "F"

Letter to the members of the Legislature from the Honorable Thomas L. Bailey, Governor, on November 29, 1944, enclosing a letter of the Honorable Greek L. Rice, Attorney General, wherein, among other things, the Attorney General said:

> "Our land and what is upon and under the surface constitute our natural resources. The state is dependent upon its land, upon what is grown or is found on the surface and on what is present in the way of mineral deposits underneath the surface. Every state is wisely jealous of encroachments upon its territorial domain. (See Hamilton, Essay IV of The Federalist, Lodge Edition). And every state should be wisely alert to preserve its *proprietary sovereign right* to exploit the natural resources within its boundaries.
>
> * * * * *
>
> "Section 4 of the Constitution of 1890 provides that——

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In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 247

KALMIA REALTY & INSURANCE COMPANY, ET AL., PETITIONERS

v.

THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 444) is reported in 181 F. 2d 598.

JURISDICTION

The judgment of the Court of Appeals was entered May 15, 1950 (R. 445). The petition for a writ of certiorari was filed August 12, 1950. The jurisdiction of this Court is invoked under 28 U. S. C. sec. 1254(1).

QUESTION PRESENTED

Whether in a suit brought by the United States to quiet its title to land, it was rightly held that

neither the Government's grantor nor a purchaser at a sale for delinquent state and county taxes had any interest therein.

STATEMENT

The United States brought this suit against Kalmia Realty & Insurance Company and Tom Hendrix, petitioners here, to quiet title to Mississippi land conveyed to it by Kalmia by two deeds made December 29, 1933, and a third deed made November 13, 1941 (R. 2-26).

The first 1933 deed covered 481 acres in Jones County (R. 7-11). The second deed of the same date conveyed approximately 19,587.54 acres in Wayne County (R. 18-26). The 1941 deed embraced 119.3 acres in Jones County (R. 12-17).

Each 1933 deed provided (R. 8-9, 22-23):

> Reserving, however, to the Kalmia Realty and Insurance Company, its successors and assigns, for a period of Ten (10) years from December 24, 1933, with extensions as hereinafter provided, all oil, gas and other valuable minerals deposited in, on or under said tracts of land, * * *
>
> Provided: That if at the termination of the said ten year period of reservation it is found that such oil, gas, and other valuable minerals, mineral rights and interests are being operated or have been operated at any time during the preceding five years, to commercial advantage, then and in that event, the said right to mine and remove said oil, gas, and other valuable

> minerals, shall extend for a further period of five years, and further: That the right to mine and remove oil, gas, and other valuable minerals shall extend in periods of five (5) years whenever operation during the preceding five years has been for an average of 120 days per year throughout the period.
>
> * * * * *
>
> Provided: That at the termination of the ten year period, if not extended, or at the termination of any extended period, in case the operation has been carried on for the number of days and under conditions stated, the right to mine and remove oil, gas and other valuable minerals shall terminate and a complete fee in the land become vested in the United States, * * *

The 1941 deed contained a similar reservation which unless extended, would terminate July 1, 1949 (R. 13-14).

So far as concerns Kalmia, the trial court found and held (R. 391-399, 421-423):

Kalmia asserted that Raymond M. Conarro, who represented the Secretary of Agriculture in the negotiations resulting in the 1933 conveyances, falsely told its representatives that the Secretary could not permit a reservation of mineral rights for more than 10 years, and that therefore the 1933 deeds were procured by fraud. But Kalmia had failed to establish that Mr. Conarro made the statement. (Fdg. 7, R. 394-395.) In any event, since Kalmia could ascertain the Secretary's statutory

power, it could not rely on any legal representations made on his behalf (R. 423).

Kalmia further asserted that the lands conveyed in 1933 were operated to commercial advantage during the five years immediately preceding December 24, 1943, and hence that the reservation did not terminate on that date (Fdg. 5, R. 393). While Kalmia itself did not prospect for minerals, it made mineral leases from which it received $15,000 or $16,000. However, its lessees did not produce oil in commercial quantities, as required by the deeds, and accordingly the reservation did end on December 24, 1943. (Fdg. 10, R. 396; Concl. 2, R. 397.)

So far as concerns Hendrix, the facts were stipulated (R. 400-402) as follows:

For the year 1941 the State of Mississippi and Wayne County taxed the mineral interest in the 19,587.54 acres conveyed by the second 1933 deed. The taxes were not paid and Hendrix purchased at tax sales. Neither he, nor anyone acting for him, operated the mineral interest to commercial advantage. The United States has been in exclusive possession of the lands since December 24, 1943, and has granted to others oil and gas leases thereto.

Upon the basis of the stipulation, the trial court held (R. 407-412): The State and County could tax only the interest in the lands which Kalmia reserved by the 1933 deed. Consequently, the tax deeds conveyed to Hendrix only that limited interest. Since neither Kalmia nor Hendrix had ever

operated the mineral interest to commercial advantage, the interest had expired on December 24, 1943.

On May 12, 1949, the trial court entered judgment that the United States is the owner in fee simple of the lands described in the 1933 deeds and that it is the owner of the land described in the 1941 deed "subject only to the reservations, exceptions, terms and conditions of that deed".[1] Petitioners, and all claiming under them, were permanently enjoined from asserting to the contrary. (R. 419-421.)

The Court of Appeals affirmed *per curiam* (R. 444) saying: "From the standpoint of both reason and result, we think that the decision and judgment of the Court below were correct."

ARGUMENT

The decisions below are plainly correct, and petitioners present no questions calling for further review. Since the Government's title depends entirely upon the deeds it obtained from Kalmia, it is obvious that the question as to the validity and extent of the Government's interest can be completely determined by its suit against Kalmia and Hendrix, whose interest is derived from Kalmia. *United States* v. *Oregon,* 295 U. S. 1, 12, 24; *United States* v. *California,* 332 U. S. 19, 22-23. There is

[1] Since the termination date of the reservation in the 1941 deed, July 1, 1949, had not been reached when the judgment was rendered on May 12, 1949, the judgment quieting the Government's title to the land covered by that deed had to be "subject" to the reservation.

therefore no warrant for petitioners' contention (Pet. 20-25) that those to whom the Government, as the fee-owner, has leased the mineral interests are indispensable parties.

The judgment against Kalmia is clearly right. There is no basis in the record for its contention (Pet. 14-15, 76-78) that the 1933 deeds were induced by the false statement of a government employee. For, as the trial court found (R. 394), Kalmia could not show that the alleged statement was made. The lower court's interpretation of operation to "commercial advantage" under the reservation (R. 396-7) is also plainly correct.

Equally correct is the injunction against claims by Hendrix to an interest in the 19,587.54 acres sold for 1941 delinquent State and County taxes. Subject to the reservation of mineral rights, Kalmia conveyed to the United States its entire right, title and interest in these lands. Upon expiration of the reservation, the United States was to acquire "a complete fee in the land" (R. 9, 23). *Supra*, p. 3. The State and County could not tax the reversionary interest of the United States. *Van Brocklin* v. *State of Tennessee*, 117 U.S. 151, 179-180; *Clallam County* v. *United States*, 263 U.S. 341, 345; *Lee* v. *Osceola Imp. Dist.*, 268 U.S. 643, 645; *United States* v. *Allegheny County*, 322 U.S. 174, 188-189; *Cleveland* v. *United States*, 323 U.S. 329, 333. Cf. *Utah Power & Light Co.* v. *United States*, 243 U.S. 389, 403-404. In other words, they taxed—and subsequently sold to Hen-

drix—only Kalmia's balance of the ten-year term and the right to have it extended if minerals were produced in commercial quantities. *New Brunswick* v. *United States,* 276 U.S. 547, 556; *Baltimore Shipbuilding Co.* v. *Baltimore,* 195 U.S. 375, 382. Since, as Hendrix stipulated (R. 401), there was no such production, the reservation expired on December 24, 1943, and Hendrix no longer had an interest in the property.

Hendrix's contention (Pet. 25-73) that there is question whether the decisions just cited have been overruled is patently erroneous. *West* v. *Oklahoma Tax Commission,* 334 U.S. 717, 723.[2]

CONCLUSION

The judgment below is correct and the case does not warrant review. The petition for a writ of certiorari should therefore be denied.

Respectfully submitted,

PHILIP B. PERLMAN,
Solicitor General.
A. DEVITT VANECH,
Assistant Attorney General.
JOHN F. COTTER,
Attorney.

SEPTEMBER 1950.

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[2] Contrary to petitioner's contention (Pet. 43-53), the Weeks Act does not even hint at a consent by the United States to state taxation of property acquired by the United States under its provisions.

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